

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VERIDIAN CREDIT UNION, on behalf of
itself and a class of similarly situated financial
institutions,

Plaintiff,

v.

EDDIE BAUER LLC,

Defendant.

NO. 2:17-cv-00356 (JLR)

MOTION TO COMPEL DISCOVERY

Note on Motion Calendar: May 11, 2018

TELEPHONIC ORAL ARGUMENT
REQUESTED

Plaintiff Veridian Credit Union (“Plaintiff” or “Veridian”) respectfully moves this Honorable Court for an order compelling Defendant Eddie Bauer LLC (“Defendant” or “Eddie Bauer”) to produce documents responsive to Veridian’s First Set of Requests for Production of Documents (“Requests for Production”) (attached as Ex. 1 to the Declaration of Joseph P. Guglielmo (“Guglielmo Decl.”) filed concurrently herewith). Plaintiff further moves to compel Eddie Bauer to produce a privilege log pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and the Court’s Order Regarding Discovery of Electronically Stored Information (ECF No. 63) (“ESI Order”). As described below, to date, despite repeated requests by Plaintiff that Eddie Bauer produce the requested documents, Eddie Bauer has failed to respond. Moreover, despite repeated requests by Plaintiff that Eddie Bauer produce a privilege log, Eddie Bauer has failed to do so. Plaintiff seeks an order compelling Eddie Bauer to immediately produce a privilege log. Alternatively, to the extent that the Court deems it appropriate, Plaintiff requests that any privilege associated with any withheld document be waived as Eddie Bauer was required to timely produce its privilege log following the

1 completion of its document production and has provided no reason for its failure to comply with the
2 Federal Rules of Civil Procedure or the Court's ESI Order.

3 Plaintiff's requested relief is timely. On January 19, 2018, Defendant represented that it had
4 completed its document production. Pursuant to the Court's February 9, 2018 Stipulation and Order
5 (ECF No. 80) granting the parties' Stipulated Motion to Establish New Class Discovery Deadline
6 and Class Certification Schedule (ECF No. 78), discovery relating to Veridian's class certification
7 motion is to be completed by May 22, 2018 and Veridian is required to file its motion for class
8 certification by June 6, 2018. A privilege log will allow Plaintiff to identify those documents that
9 Plaintiff believes Eddie Bauer is improperly withholding or to confirm that evidence relevant to
10 Plaintiff's claim has been produced.

11 **Electronically Stored Information**

12 On February 6, 2018, the parties met and conferred regarding several ongoing discovery
13 disputes, including, but not limited to, deficiencies with the initial search terms. During this call,
14 Defendant agreed it was conceivable that terms may have been missed in its initial search and agreed
15 to run Plaintiff's proposed terms against documents left out of Defendant's initial search. Plaintiff
16 emailed Defendant a list of Supplemental Search Terms on February 16, 2018. *See* Guglielmo Decl.,
17 Ex. 2. On February 17, 2018, Plaintiff requested that Defendant confirm receipt of the prior day's
18 email and further requested that it provide the results of the additional search terms. *Id.* Defendant
19 did not respond. Since February 17, 2018, Plaintiff has sent numerous emails requesting information
20 as to the results of these additional searches and the production of such documents. Plaintiff further
21 offered to schedule a follow up meet-and-confer call. Despite these repeated requests, Defendant
22 has failed to respond.

23 Before moving this Court for relief, Plaintiff summarized its continued efforts to resolve this
24 ongoing discovery dispute in a letter to Defendant on March 22, 2018. *See* Guglielmo Decl., Ex. 3.
25 Again, Plaintiff requested that Defendant "confirm that you have accepted our list of search terms
26 under subpart b" of the Agreement Regarding Discovery of Electronically Stored Information and
27 that "you have or will be applying these terms in accord with subpart d." *Id.* at 2. Plaintiff requested

1 that Defendant confirm its production before March 28, 2018. Defendant has not responded to
2 Plaintiff's repeated requests. Rule 34(b)(2) states: "*Objections*. An objection must state whether any
3 responsive materials are being withheld on the basis of that objection. An objection to part of a
4 request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C)
5 (emphasis in original). Given that Eddie Bauer has failed to state in its objections that it was
6 withholding specific information called for by Plaintiff's requests, or provide any basis as to why it
7 did not include certain search terms that would clearly yield responsive documents, Plaintiff believes
8 Eddie Bauer should be compelled to produce the documents responsive to these search terms.

9 **Defendant's Instant Messenger Program**

10 Plaintiff's March 22, 2018 letter to Defendant also requested for Defendant to search for and
11 produce responsive instant messages. *See* Guglielmo Decl., Ex. 3. As Plaintiff's letter explains,
12 "Defendant has produced multiple documents showing an internal chat was used within Defendant's
13 business. Examples of these chats are shown in EB0089209 and EB0108002." *Id.* at 1.

14 On March 29, 2018, Plaintiff took the deposition of Jeffrey Pillers, Defendant's Director of
15 Technology Operations Support and Security. During that deposition, Mr. Pillers confirmed that
16 Defendant's employees use Skype to communicate internally with one another in real time and that
17 Skype converts these real time conversations into a written format and saves them within, for
18 example, an email. Guglielmo Decl., Ex. 4 at 218:8-219:13.

19 Plaintiff is entitled to responsive documents formatted as instant messages. Indeed,
20 Plaintiff's Requests for Production specifically define "Communication" to include "instant
21 messages." Guglielmo Decl., Ex. 1 at 2. Defendant's objections did not state, nor has Defendant
22 argued, that instant messages are not relevant or that Eddie Bauer would not produce such relevant
23 responsive documents. On April 4, 2018, Plaintiff again wrote to Eddie Bauer requesting that
24 responsive instant messages be produced and informing Defendant that if such documents were not
25 produced, Plaintiff would move to compel their production. *See* Guglielmo Decl., Ex. 5. Despite
26 these facts, Eddie Bauer has not responded to Plaintiff's letters requesting that it produce the missing
27

1 instant messages, such that Plaintiff has no choice but to seek relief before it is further prejudiced by
2 Defendant's incomplete production.

3 2016 Mandiant Report

4 Mr. Pillers also testified during his deposition that Mandiant performed penetration testing
5 for Defendant in 2016. Guglielmo Decl., Ex. 4 at 193:13-194:5. Mr. Pillers confirmed that a report
6 was generated regarding this testing (*id.* at 193:23-24), that he'd seen it (*id.* at 194:4-5), and that
7 Defendant's Manager of IT Security, Peter Van Loon, would have a copy of the 2016 Mandiant
8 penetration report (the "2016 Mandiant Report"). *Id.* at 194:25-195:3. Notably, Eddie Bauer
9 produced the 2015 Mandiant penetration testing report, but not the 2016 Mandiant Report, nor has
10 Eddie Bauer stated in its objections or in any correspondence that the 2016 Mandiant Report would
11 be withheld and not produced.

12 Plaintiff served its discovery requests eight months ago, and Defendant still has not produced
13 the 2016 Mandiant Report. Defendant's nondisclosure has prejudiced Plaintiff, stripping from it the
14 opportunity to meaningfully examine Mr. Pillers about the 2016 Mandiant Report. The relief
15 Plaintiff seeks is necessary, so that it can review the 2016 Mandiant Report and recall Mr. Pillers if
16 necessary before the close of discovery on May 22, 2018.

17 Security Logs

18 Mr. Pillars testified during his deposition that Defendant maintained security logs (*id.* at
19 162:19-163:11) from its Deep Security and Office Scan programs, which fed into QRadar. *Id.* at
20 258:4-9. Mr. Pillars testified that these logs were provided to Verizon from the applications that
21 relate to the malware identified on Defendant's systems, including the logs identifying the first
22 occasion that such logs identified the malware on Defendant's systems in January 2016. *Id.* at 256:6-
23 11. Despite the fact that these documents were provided to Verizon in connection with their
24 investigation into the cause of the data breach, Defendant has failed to produce those logs.
25 Defendant has not responded to Plaintiff's numerous requests for responsive documents, including
26 a request sent on April 4, 2018, for these specific logs. *See* Guglielmo Decl., Ex. 5. Defendant has
27 wholly failed to respond to Plaintiff's request that these logs be produced.

Production of Privilege Log

Plaintiff's March 22, 2018 letter to Defendant requested that Defendant produce a privilege log. *See* Guglielmo Decl., Ex. 3. The ESI Order requires that Defendant produce a privilege log 30 days after it completes its production. Notwithstanding Plaintiff's position that Defendant's production is deficient, Defendant has previously represented they completed production on January 19, 2018. Defendant should have produced a privilege log to support the objections based upon privilege in their discovery responses by February 18, 2018. Eddie Bauer has offered no reason why it has not produced a privilege log in this case. Rule 26(b)(5) states:

Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5)(A)(i)-(ii) (emphasis in original). Moreover, "The purpose of Rule 34 is to make relevant and non-privileged documents, electronically stored information, and objects in the possession of one party available to the other, thus eliminating strategic surprise and permitting the issues to be simplified and the trial to be expedited." C. Wright, et al., *FEDERAL PRACTICE & PROCEDURE (CIVIL)* § 2202 (3d ed. 2014) (footnotes omitted).

Plaintiff requests that Eddie Bauer be compelled to immediately produce a privilege log. Alternatively, to the extent the Court believes that Eddie Bauer's delay is material and its failure to produce any privilege log is prejudicial, Plaintiff seeks an order that Eddie Bauer has waived any privilege associated with withheld documents that it has failed to identify and produce. *See LifeGoals Corp. v. Advanced Hair Restoration LLC*, No. C16-1733JLR, 2017 WL 6516042, at *3-4 (W.D. Wash. Dec. 19, 2017); *see also Burlington N. & Santa Fe Ry. Co. v. U.S.D.C. for Dist. of Mont.*, 408 F.3d 1142, 1147 (9th Cir. 2005); *H.T. Dev., LLC v. Imperial Props., Inc.*, No. 2007-CV-0109, 2008 WL 5657594 at *1 (D.V.I. July 29, 2008) ("[I]n the absence of a privilege log, the Court finds that Plaintiff has waived any applicable privilege(s)."); *In re Chevron Corp.*, 749 F. Supp. 2d

1 170, 181 (S.D.N.Y. 2010) (“[T]he starting position is that the privilege log must be served with the
2 objections or motion to quash and that the failure to do so may result in waiver of the privilege
3 claims.”).

4 Plaintiff moves for an order compelling Defendant to produce: (1) all documents responsive
5 to the list of Supplemental Search Terms Plaintiff provided Defendant on February 16, 2018; (2) all
6 responsive instant messages; (3) the 2016 Mandiant Report; (4) all responsive security logs; and (5)
7 Defendant’s privilege log.

8 Plaintiff further requests a telephone conference to discuss this Motion.

9 Respectfully submitted this 26th day of April, 2018.

10 TOUSLEY BRAIN STEPHENS PLLC

11 By: /s/ Kim D. Stephens

12 Kim D. Stephens, WSBA #11984
13 Chase C. Alvord, WSBA #26080
14 1700 Seventh Avenue, Suite 2200
15 Seattle, Washington 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992
kstephens@tousley.com
calvord@tousley.com

16 Joseph P. Guglielmo
17 SCOTT+SCOTT
18 ATTORNEYS AT LAW LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com

21 Erin G. Comite
22 SCOTT+SCOTT
23 ATTORNEYS AT LAW LLP
156 South Main Street
P.O. Box 192
Colchester, CT 06415
Telephone: (860) 537-5537
Facsimile: (860) 537-4432
ecomite@scott-scott.com

26 Gary F. Lynch
27 Kevin W. Tucker
CARLSON LYNCH SWEET KILPELA
& CARPENTER, LLP

1 1133 Penn Avenue, 5th floor
2 Pittsburg, PA 15212
3 Telephone: (412) 322-9243
4 Facsimile: (412) 231-0246
5 glynch@carlsonlynch.com

6 Karen H. Riebel
7 Kate Baxter-Kauf
8 LOCKRIDGE GRINDAL NAUEN P.L.L.P.
9 100 Washington Avenue S., Suite 2200
10 Minneapolis, MN 55401
11 Telephone: (612) 339-6900
12 Facsimile: (612) 339-0981
13 khriebel@locklaw.com
14 kmbaxter@locklaw.com

15 Arthur M. Murray
16 MURRAY LAW FIRM
17 650 Poydras St., Suite 2150
18 New Orleans, LA 70130
19 Telephone: (504) 525-8100
20 Facsimile: (504) 284-5249
21 amurray@murray-lawfirm.com

22 Brian C. Gudmundson
23 ZIMMERMAN REED, LLP
24 1100 IDS Center, 80 South 8th St.
25 Minneapolis, MN 55402
26 Telephone: (612) 341-0400
27 Facsimile: (612) 341-0844
brian.gudmundson@zimmreed.com

Bryan L. Bleichner
CHESTNUT CAMBRONNE PA
17 Washington Avenue North, Suite 300
Minneapolis, MN 55401
Telephone: (612) 339-7300
Facsimile: (612) 336-2921
bbleichner@chestnutcambronne.com

Attorneys for Plaintiff Veridian Credit Union

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 37(a)(1)

Pursuant to Local Rule 37(a)(1), counsel met and conferred on February 6, 2018, March 22, 2018, and April 4, 2018 in good faith to resolve or narrow the issues raised in this Motion.

TOUSLEY BRAIN STEPHENS PLLC

By: /s/ Kim D. Stephen
Kim D. Stephens, WSBA #11984
Chase C. Alvord, WSBA #26080
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Telephone: (206) 682-5600
kstephens@tousley.com
calvord@tousley.com

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I electronically filed the foregoing Motion to Compel Discovery with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Chase C. Alvord
calvordtousley.com

Erin G. Comite
ecomite@scott-scott.com

Gary F. Lynch
glynch@carlsonlynch.com

Kevin W. Tucker
ktucker@carlsonlynch.com

Joseph P. Guglielmo
jguglielmo@scott-scott.com

Karen H. Riebel
khriebel@locklaw.com

Kate M. Baxter-Kauf
kmbaxter-kauf@locklaw.com

Kathleen A. Nelson
kathleen.nelson@lewisbrisbois.com

Sarah E. Demaree
sarah.demaree@lewisbrisbois.com

Dyanne J. Cho
dyanne.cho@lewisbrisbois.com

Jon P. Kardassaki
jon.kardassakis@lewisbrisbois.com

Dated: April 26, 2018

/s/ Kim D. Stephens
Kim D. Stephens, WSBA #11984